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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTONIO RODRIGUEZ MARTINEZ, Appellant.	2 CA-CR 2007-0246 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061213

Honorable John E. Davis, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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B R A M M E R, Judge.

¶1 Appellant, Antonio Martinez, appeals from his convictions for aggravated driving under the influence of an intoxicant (DUI). He argues the trial court erred in instructing the jury on reasonable doubt and contends his constitutional rights were violated because the trial court did not require his prior convictions to be found by a jury beyond a reasonable doubt. Finding no error, we affirm.

Factual and Procedural Background

¶2 Because the facts underlying Martinez's convictions are not relevant to the issues he raises on appeal, we do not set them out here. In 2006, a grand jury charged Martinez with two counts of aggravated DUI—one for driving under the influence of an intoxicant while his license was suspended or revoked and one for driving with an alcohol concentration of .08 or more while his license was suspended or revoked. *See* A.R.S. §§ 28-1381(A)(1) and (2), 28-1383(A)(1). For the purpose of sentence enhancement, the state alleged Martinez had two prior convictions for aggravated DUI. After a two-day trial, over Martinez's objection, the trial court instructed the jury on reasonable doubt pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), and the jury found Martinez guilty of both charges. The court held a bench trial on the state's allegation of prior convictions. Despite Martinez's assertion that the state was required to prove the allegations beyond a reasonable doubt, the court found the state had proved the prior convictions by clear and convincing evidence. The court sentenced Martinez to concurrent, mitigated terms of imprisonment totaling eight years.

Discussion

¶3 Martinez argues the reasonable doubt instruction the trial court gave pursuant to *Portillo* "relieved the state of its constitutional burden of proof, resulting in fundamental, structural error." Our supreme court has repeatedly rejected similar challenges to this instruction. *See, e.g., State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our supreme court's decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Accordingly, we do not address this argument further.

¶4 Martinez next asserts his "constitutional rights to due process of law and to a jury trial were violated when the prior conviction[allegations] were tried at a bench trial and not to a jury." By failing to object below to having the trial court, rather than the jury, find his prior convictions, Martinez has forfeited the right to obtain appellate relief on this issue absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "To obtain relief under the fundamental error standard of review, [an appellant] must first prove error." *Id*. ¶ 23.

¶5 Rule 19.1(b)(2), Ariz. R. Crim. P., provides that, although sentencing allegations generally must be tried to a jury, the allegation of a prior conviction is to be determined by the trial court. The United States Supreme Court has recognized the

constitutionality of such a procedure. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also State v. Anderson*, 211 Ariz. 59, n.2, 116 P.3d 1219, 1221 n.2 (2005) (citing *Apprendi* and noting "fact of a prior conviction may constitutionally be found by the trial judge, rather than the jury"). As previously stated, we are bound to follow these decisions. *See Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d at 1009; *State v. Swoopes*, 216 Ariz. 390, ¶ 38, 166 P.3d 945, 957 (App. 2007) (state courts bound by United States Supreme Court's interpretation of federal constitution).

¶6 Last, Martinez contends the trial court was required to find his prior convictions beyond a reasonable doubt. But we have held that "prior convictions for sentence enhancement purposes must be established by clear and convincing evidence." *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). Although Martinez concedes that *Cons* establishes the applicable standard of proof for prior convictions used for enhancement purposes, he argues the reasoning in *Cons* is flawed. But Martinez presents no new authority to support a departure from *Cons*, relying instead on an argument nearly identical to one we rejected in *State v. Keith*, 211 Ariz. 436, ¶¶ 2-3, 122 P.3d 229, 229-30 (App. 2005). Because Martinez has given us no compelling reason to do so, we decline to reconsider *Cons*.

Disposition

¶7 For the reasons stated, we affirm Martinez's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge